



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON, D.C. 20370-5100

JRE
Docket No: 8425-98
24 October 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: CWO2 [REDACTED] USN RET, [REDACTED],
REVIEW OF NAVAL RECORD

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected by to show that he was retired by reason of physical disability effective 1 June 1997.

2. The Board, consisting of Mses. Newman, Schnittman and Taylor reviewed Petitioner's allegations of error and injustice on 27 April 2000 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. Petitioner's request for voluntary retirement was approved on 7 January 1997, to be effective during April 1997. He had a long history of lower back complaints, and had undergone spinal surgery on two occasions in 1991. His symptoms became worse in 1995, and according to collateral entries in his health record, the symptoms were noted on his retirement physical. A copy of the report of the retirement physical is not available. As his retirement date had been set when he underwent his final physical examination, he was retired on 1 June 1997, and referred to the spine clinic at a Naval hospital for further evaluation. Based on his symptoms and the results of examinations conducted on 17 June 1997, it was recommended that he undergo spinal fusion surgery. On 15 August 1997, during the course of a pre-operative evaluation, he disclosed that he had low back pain, as

well a leg pain that radiated down his right leg to his ankle and great toe. He also reported some bladder incontinence, but no incontinence of stool, history of hesitancy or urgency, or change in bowel habits or sexual function. He underwent an L4-5 spinal fusion on 21 August 1997. The surgery was complicated by a dural tear which resulted in a right foot drop. In a letter dated 9 October 1997, a Navy orthopedic surgeon stated that Petitioner had undergone spinal fusion surgery because of chronic problems that were significantly limiting his ability to perform daily activities. In the physician's opinion, Petitioner had been unfit for employment since his release from active duty on 31 May 1997. He estimated that Petitioner would require at least six months to convalesce from his surgery. On 15 November 1997, the Department of Veterans Affairs (VA) awarded him a 60% rating under VA code 5293 for herniated nucleus pulposus L4-5, status post discectomies time 2 and fusion, and 100% from 21 August 1997, to be reduced to 60% effective 1 March 1998. In addition, he was granted a 0% rating for hypertension. Compensable ratings were added for conditions of his right shoulder and elbow, attention deficit hyperactivity disorder, asthma, and hypertension, and his combined rating increased to 80%, on 30 April 1998, and made retroactive to 1 June 1997. His request to be declared unemployable was denied on 15 September 1998.

d. Department of Defense Instruction 1332.38, 14 November 1996, provided at part 3E, in effect, that continued performance of duty until a service member is approved for length of service retirement creates a rebuttable presumption that a member's condition has not caused career termination. The presumption can be overcome, pertinently, when during the presumptive period there is a serious deterioration of a previously diagnosed condition which would preclude further duty if the member were not retiring.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board finds that there was a serious deterioration of Petitioner's lower back condition between the dates of the approval of his request for voluntary retirement and his transfer to the Retired List which would have precluded further duty. The Board concludes that had he been retained on active duty for further evaluation and treatment of his spinal complaints, he would have been found unfit for duty and transferred to the Temporary Disability Retired List. Accordingly, it finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

- a. That Petitioner's naval record be corrected to show that he was transferred to the Temporary Disability Retired List effective 1 June 1997 with a 20% rating under VA code 5293 for herniated nucleus pulposus, L4-L5, pursuant to 10 U.S. Code 1202.
- b. That he be accorded a periodic physical examination as soon as practicable. Current address: [REDACTED]
- c. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

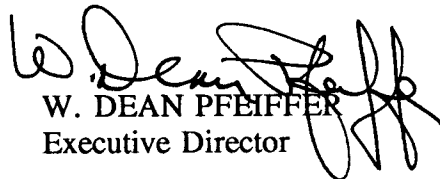
4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) it is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



JAMES R. EXNICIOS
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER
Executive Director